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IN THE

Supreme Court of the United States

JEANNE S. WOODFORD and ANTHONY P. KANE,

Petitioners,

v.

CORRECTED COPY

VIET MIKE NGO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES OF NEW YORK, ARIZONA, ARKANSAS, COLORADO, GEORGIA, HAWAII, IDAHO, KANSAS, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, NEVADA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, SOUTH CAROLINA, UTAH, VERMONT, VIRGINIA, WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE PETITION

CORRECTED COPY

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STATEMENT OF INTEREST OF AMICI CURIAE

The statutory exhaustion requirement at issue in this case mandates exhaustion of administrative remedies in all actions brought by inmates "with respect to prison conditions." Prison Litigation Reform Act of 1995 ("PLRA"), Pub. L. No. 104-134, § 803(d), 110 Stat. 1321-66, 1321-71 (1996), codified at 42 U.S.C. § 1997e(a).[1] In enacting the PLRA, which expanded the scope of the exhaustion requirement for suits brought by prisoners and made exhaustion mandatory in such actions, Congress sought to significantly enhance the ability of amici States to use their prison grievance procedures as a tool for safe and effective prison administration, as well as to reduce the number of prisoner lawsuits.

For decades, prison grievance procedures have played an important role in prison administration. Inmate grievances provide timely feedback to state officials about problems that arise in correctional facilities. In individual cases, grievance procedures enable prison administrators to take prompt remedial action that may satisfy the inmate and obviate the need for litigation. From a systemic perspective, such procedures allow prison officials to monitor trends in prisoner complaints before unwise institutional policies or patterns of inappropriate conduct by correctional officers lead to frustration among the inmate population, potentially triggering prisoner unrest or disturbances. Grievance

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1. Section 1997e(a) provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."

procedures also allow state officials to create factual records of any disputes that may eventually be litigated in court, and to filter out meritless inmate claims, thereby reducing the States' costs of defending against frivolous prisoner litigation.

By putting States to the choice of foregoing either full exhaustion or timely filing of inmate grievances, the decision below, if not reviewed and reversed by this Court, will seriously compromise the efficacy of amici States' prison grievance procedures.

SUMMARY OF ARGUMENT

This case presents the important question whether an inmate who files an untimely administrative grievance that prison officials properly reject on that ground has nevertheless exhausted his available administrative remedies within the meaning of 42 U.S.C. § 1997e(a). Put another way, the issue is whether the PLRA exhaustion requirement includes a "procedural default" component.

The Second, Third, Seventh, Tenth, and Eleventh Circuit Courts of Appeal have concluded that the Congressional purposes underlying § 1997e(a) are better served by applying a procedural default rule. *See Williams v. Comstock*, __ F.3d __, 2005 U.S. App. LEXIS 21086 (2d Cir. Sept. 29, 2005); *Spruill v. Gillis*, 372 F.3d 218, 230 (3d Cir. 2004); *Pozo v. McCaughtry*, 286 F.3d 1022, 1025 (7th Cir. 2002); *Ross v. County of Bernalillo*, 365 F.3d 1181, 1186 (10th Cir. 2004); *Johnson v. Meadows*, 418 F.3d 1152, 1159 (11th Cir. 2005).[2]

2. A petition for certiorari from the Eleventh Circuit's decision in *Johnson* is pending before the Court. *See Johnson v. Meadows*, No. 05-6336. The instant petition presents a better vehicle for this (Cont'd)

On the other hand, the Sixth and, in the decision below, Ninth Circuits have concluded that the timeliness of an inmate's grievance is essentially irrelevant to the PLRA's exhaustion requirement. Pet. App. 1-21; *Thomas v. Woolum*, 337 F.3d 720, 735 (6th Cir. 2003). This deep and growing conflict, addressed at length in California's petition for certiorari, warrants immediate review by this Court.

Amici States seek here to address a separate factor that makes this petition cert-worthy: the substantial public

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(Cont'd)
Court's review of the question presented because the administrative deadlines of California's prison grievance system are more representative of those nationwide than are the deadlines of Georgia's prisons at issue in *Johnson*. *Compare, e.g.*, Cal. Code Regs. tit. 15, § 3084.6(c) (15 working days); Fla. Admin. Code Ann. r. 33-103.011(b) (15 calendar days); Kan. Admin. Regs. § 44-15-101b (15 business days); La. Admin. Code tit. 22, § 325(A)(2) (30 days); Md. Regs. Code tit. 12, § 12.07.01.06(A) (same); 7 N.Y.C.R.R. § 701.7(a)(1) (14 calendar days); Ohio Admin. Code § 5120-9-31(J)(1) (same); W. Va. Code St. R. § 90-9-3.1.1 (15 days); Wis. Admin. Code DOC 310.09(b) (14 calendar days); Alaska Dep't of Corrs., Policies and Procedures, ch. 808, index no. 808.03, at 2, *available at* http://www.correct.state.ak.us/corrections/pnp/pdf/808.03.pdf (last visited Oct. 31, 2005) (30 days); Colo. Dep't of Corrs., Admin. Reg. No. 850-04(IV)(D)(1)(a), at 6, *available at* http://www.docs.state.co.us/admin_reg/PDFs/0850_04.pdf (last visited Oct. 31, 2005) (30 days); Conn. Dep't of Corrs., Admin. Directive 9.6(10)(D), at 4, *available at* http://www.ct.gov/LIB/doc/PDF/AD/ad0906.pdf (last visited Oct. 31, 2005) (30 days); Idaho Dep't of Corrs., Policy No. 316 § 05.03.00, at 3, *available at* http://www.corrections.state.id.us/policy/int316.pdf (last visited Oct. 31, 2005) (15 days); 28 C.F.R. § 542.14(a) (20 calendar days); *with* Ga. Dep't of Corrs. S.O.P. IIBOD-0001 (2001) (five days); Neb. Admin. Code tit. 68, ch. 2, § 004.01 (three calendar days); R.I. Code R. 06 070 002(10) (three days).

importance of clarifying the meaning of the PLRA's exhaustion requirement. In the Ninth Circuit's view, all that this provision requires is that prison officials receive some "opportunity" to address an inmate's complaints, Pet. App. 17, regardless of whether the inmate complies with the prison's procedural rules. That position cannot be squared with the policies underlying the PLRA's exhaustion requirement, which unmistakably indicate that failure to timely grieve a dispute should generally constitute a procedural default that bars litigation of a claim.

This Court has explained that an inmate's use of prison grievance procedures helps to "reduce the quantity and improve the quality" of prisoner litigation by filtering out some claims and facilitating the development of a factual record for claims that do wind up in litigation. *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002). Since those benefits are realized only when grievances are considered by prison officials on the merits, it follows that the exhaustion requirement meant to create strong incentives for inmates to file timely grievances likely to result in such merits consideration. The Ninth Circuit's rule would nullify these incentives by treating timely and untimely grievances as equally acceptable ways for an inmate to exhaust administrative remedies.

Further, under the Ninth Circuit's cramped reading, the PLRA's exhaustion requirement would have the perverse effect of impairing, rather than enhancing, the utility of prison grievance systems as a tool for prison management. Deadlines are essential to the operation of prison grievance procedures — they facilitate prompt investigation and resolution of grievances, allow for swift remedial responses, and ensure that prison officials receive timely information about prisoner

complaints before inmate dissatisfaction leads to unrest. The Ninth Circuit's rule confronts prison officials with two equally bad alternatives: they can either continue to enforce those critical administrative deadlines but forego the right to a prisoner's exhaustion of administrative remedies prior to filing suit, or, alternatively, routinely consider inmate grievances on the merits regardless of how untimely they may be filed. This Court should grant California's petition for certiorari to confirm that the PLRA does not require this illogical result.

ARGUMENT

I. A Procedural Default Rule is Necessary for the PLRA's Exhaustion Requirement to Serve Its Intended Purposes.

Courts commonly apply procedural default rules to preserve the effectiveness of exhaustion requirements. Thus, in habeas corpus cases, this Court considers a procedural default rule necessary "to protect the integrity" of the exhaustion requirement set forth in 28 U.S.C. § 2254. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999); *see also Edwards v. Carpenter*, 529 U.S. 446, 452-53 (2000) (noting "the inseparability of the exhaustion rule and the procedural-default doctrine"). Likewise, where the law mandates exhaustion of administrative remedies, the general rule is that a litigant forfeits claims by failing to raise them in a timely fashion before the administrative agency. *See, e.g., United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952). As the majority of courts have recognized, *see supra* at 2-3, the PLRA's exhaustion requirement will be largely rendered toothless unless it is similarly construed to include a procedural default component.

The PLRA's core objective is to reduce the burden that prisoner litigation places on the courts. Its enactment was spurred by the "alarming explosion in the number of frivolous lawsuits filed by State and Federal prisoners," with inmate filings having risen "from 6,600 in 1975 to more than 39,000 in 1994." 141 Cong. Rec. S14413 (daily ed. Sept. 27, 1995) (statement of Sen. Dole). According to bill sponsors, "[f]rivolous lawsuits filed by prisoners tie up the courts, waste valuable judicial and legal resources, and affect the quality of justice enjoyed by the law-abiding population." 141 Cong. Rec. S7523, S7524 (daily ed. May 25, 1995) (statement of Sen. Dole); *see also id.* at S7526 (statement of Sen. Kyl) ("[I]nmate suits are clogging the courts and draining precious judicial resources."). By enacting the PLRA, Congress aimed to "help bring relief to a civil justice system overburdened by frivolous prisoner lawsuits." 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch); *see also id.* at S14414 (statement of Sen. Dole) ("If enacted, [the PLRA] would go a long way to take the frivolity out of frivolous inmate litigation.").

"Beyond doubt," Congress meant for the strict, mandatory exhaustion requirement of § 1997e(a) "to reduce the quantity and improve the quality of prisoner suits." *Porter*, 534 U.S. at 524-525. The exhaustion requirement serves this end by "afford[ing] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." *Id.* at 525. Funneling prisoner complaints into the administrative grievance process has several benefits. First, "corrective action taken [by prison officials] in response to an inmate's grievance might improve prison administration and satisfy the inmate, thereby

obviating the need for litigation." *Id.*; *accord Booth v. Churner*, 532 U.S. 731, 737 (2001).[3] Second, "internal review might 'filter out some frivolous claims'," *Porter*, 534 U.S. at 525 (quoting *Booth*, 532 U.S. at 737) — for example, by satisfying the inmate's desire to have his complaint heard, or by offering the inmate a persuasive explanation why the claim is baseless.[4] Third, "for cases ultimately brought to court, adjudication could be facilitated by an administrative record that clarifies the contours of the controversy." *Porter*, 534 U.S. at 525; *see also* 141 Cong. Rec. H14078, H14105 (daily ed. Dec. 6, 1995) (statement of Rep. LoBiondo) (explaining that "new administrative exhaustion language" would "provide some degree of fact-finding so that when or

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3. Many inmate complaints may have merit if cast as administrative grievances, but nevertheless may be frivolous when framed as a constitutional claim in a § 1983 suit or *Bivens* action. Directing such complaints into the prison grievance process serves the dual purposes of ensuring that those grievances are first heard in the forum that can most effectively address them and reducing the burden of frivolous prisoner litigation on the courts. 141 Cong. Rec. S7523, S7526 (daily ed. May 25, 1995) (statement of Sen. Kyl) ("Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.").

4. Another PLRA provision, 28 U.S.C. § 1915(g), generally disqualifies from in forma pauperis status an inmate who has had three or more lawsuits dismissed "on the grounds that [they were] frivolous, malicious, or fail[ed] to state a claim upon which relief may be granted." Accordingly, if the administrative review process convinces the inmate that a grievance is likely frivolous, the inmate has good reason not to pursue a lawsuit, since a resulting dismissal may jeopardize his future eligibility for in forma pauperis status for other complaints with more merit.

if the matter reaches Federal court there will be a record upon which to proceed in a more efficient manner").[5]

Plainly, for the administrative grievance process to provide these benefits, a grievance filing must result in an investigation and resolution of the grievance by prison officials *on the merits*. As a category, late administrative grievances that are dismissed for untimeliness carry no possibility of (1) triggering corrective action that satisfies the inmate without litigation; (2) filtering out frivolous claims; or (3) developing a factual record that defines and narrows disputed issues in advance of federal litigation.[6]

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5. Before the PLRA's enactment, this Court declined to create by judicial decision an exhaustion requirement for Bivens actions brought by federal inmates. *See McCarthy v. Madigan*, 503 U.S. 140 (1992). In concluding that the costs of such an exhaustion requirement would outweigh its benefits, this Court *assumed* that any exhaustion requirement would necessarily include a procedural default rule. *Id.* at 152 (noting that an exhaustion requirement would create a "risk of forfeiture" by inmates' failures to meet administrative filing deadlines). By enacting the PLRA, Congress overruled *McCarthy*, leading this Court to observe that Congress "may well have thought" the *McCarthy* analysis "shortsighted" in discounting the benefits of exhaustion. *Booth*, 532 U.S. at 737.

6. Many prison grievance procedures provide that prison officials may excuse untimely filings upon a proper showing. *See, e.g.*, 7 N.Y.C.R.R. § 701.7(a)(1) note; 28 C.F.R. § 542.14(b); *see also* Cal. Code Regs. tit. 15, § 3084.3(c)(6) (providing that an administrative appeal "may be rejected" for untimeliness). Where prison officials accept a late filing and address it on the merits, it is appropriate to consider that filing "timely" for the purpose of the PLRA exhaustion requirement since, in such cases, the goals of exhaustion are fully served. *See Ross*, 365 F.3d at 1186; *Pozo*, 286 F.3d at 1025.

Accordingly, the PLRA's exhaustion requirement can succeed in reducing the burden of inmate litigation on federal caseloads only to the extent that it increases the proportion of inmate complaints that are resolved on the merits through the administrative grievance process. *See Thomas*, 337 F.3d at 738 (Rosen, J., dissenting in part) ("[T]he core purpose of § 1997e(a)'s exhaustion requirement is to ensure that prisoner grievances are resolved administratively to the greatest extent possible."). A procedural default rule is well adapted to that end, since it creates "an overwhelming incentive for a prisoner to pursue his claims to the fullest with[in] the administrative grievance system," *Spruill*, 372 F.3d at 230, and to do so in such a manner that prison officials are likely to address the claims on the merits. By contrast, the Ninth Circuit's holding that even untimely administrative filings can suffice to exhaust remedies all but nullifies the statute's effect on inmates' incentives to file a timely grievance, and, as a consequence, significantly diminishes the provision's effectiveness to direct prisoner complaints into the grievance process for merits consideration. *See Pozo*, 286 F.3d at 1025 (If "prisoners need not file timely complaints and appeals, then the incentive that § 1997e(a) provides for prisoners to use the state process will disappear.").

In its recent PLRA exhaustion decisions, this Court has unanimously turned back inmates' efforts to create exceptions that would allow them to evade the statute's strict exhaustion mandate. Thus, *Booth* rejected as "highly implausible" a reading of § 1997e(a) that would "give prisoners a strong inducement to skip the administrative process" by fashioning their complaint to seek monetary relief that was unavailable through prison grievance procedures. 532 U.S. at 741. Similarly, in *Porter*, this Court declined to adopt an exception

to the exhaustion requirement for prisoner complaints alleging "isolated episodes" of misconduct by corrections officers, thinking it "unlikely that Congress, when it included in the PLRA a firm exhaustion requirement, meant to leave the need to exhaust at the pleader's option." 534 U.S. at 530.

The Ninth Circuit's holding exhibits a similar flaw. While its rule does not excuse an inmate from making at least some attempt at exhaustion, it gives the inmate the option of only nominally satisfying the requirement through the empty formality of a long-untimely administrative filing — an avenue that is little better than dispensing with the exhaustion requirement in its entirety. The PLRA exhaustion requirement reflects a clear Congressional desire for inmate grievances to be resolved on the merits through administrative processes. The Ninth Circuit's approach undermines that goal, and "leave[s] § 1997e(a) without any oomph." *Pozo*, 286 F.3d at 1025. This Court should grant certiorari to ensure that the PLRA can serve its intended goals.

II. The Ninth Circuit's Analysis of the PLRA's Exhaustion Requirement Cannot Be Squared with Congressional Intent.

The Ninth Circuit's analysis proceeds from the false premise that the sole purpose of the PLRA exhaustion requirement is to allow prison officials *some* opportunity to address grievances internally, regardless of whether that opportunity accords with the procedural rules of the prison's grievance resolution system. The court of appeals gave great weight to the fact that California's prison grievance procedures, like those of many other correctional systems,

allow prison officials some discretion to excuse untimeliness and reach the merits of a late-filed grievance.[7]

Thus, in the Ninth Circuit's view, "[h]olding that the PLRA does not contain a procedural default bar . . . would in no way obstruct the goal of allowing prison officials first crack at resolving prison grievances. It is for the prison to decide whether to exercise its discretion and accept or refuse the opportunity to hear the case on the merits regardless whether the grievance is timely filed." Pet. App. 17. In rejecting a procedural default rule in *Thomas*, the Sixth Circuit likewise stated that the goal of the PLRA exhaustion requirement was merely to give prison officials "an opportunity to satisfy those inmate grievances the state wishes to handle internally. . . . [I]f the states forgoes an opportunity to decide matters internally whether for internal time constraints or any other reason, the PLRA has nonetheless served its purpose, and the prisoner may proceed to federal court." 337 F.3d at 726 (citation omitted).

As an initial matter, this "bare opportunity" gloss on the PLRA exhaustion requirement cannot account for core features of the mandate that an inmate "exhaust the grievance procedures offered" at the administrative level. *Booth*, 532 U.S. at 738. For example, caselaw from both the Sixth and

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7. Often, grievance procedures permit prison officials to accept untimely filings only where the inmate demonstrates "good cause" or something similar. *See, e.g.*, Ohio Admin. Code § 5120-9-31(J)(1)-(2) (requiring "good cause"); 7 N.Y.C.R.R. § 701.7(a)(1) note (requiring "mitigating circumstances"); 28 C.F.R. § 542.14(b) (inmate must "demonstrate[] a valid reason for delay"). Under the Ninth Circuit's reading, however, the PLRA mandates that an inmate who misses an administrative deadline must always file an untimely grievance, even if the inmate concededly cannot make the required showing.

Ninth Circuits requires inmates to pursue all levels of available review provided by the prison grievance system. *See, e.g., Hartsfield v. Vidor*, 199 F.3d 305, 309 (6th Cir. 1999); *Brown v. Valoff*, 422 F.3d 926, 934-35 (9th Cir. 2005). It is not enough, therefore, for an inmate to give prison officials an "opportunity" to address his claim at the initial level of review. Rather, the inmate must fully utilize the prison's grievance procedures. It is anomalous, to say the least, to dismiss the claims of an inmate who filed a timely grievance without pursuing all administrative appeals, but to excuse another inmate's long-untimely filing on the ground that prison officials nevertheless had an opportunity to address the inmate's claim if they wished to do so.

Moreover, the "bare opportunity" theory wrongly conceives of the PLRA's exhaustion requirement principally as a "benefit accorded to state prisons." *Thomas*, 337 F.3d at 726. As explained above, § 1997e(a) was meant to be much more than that. Indeed, its primary objective was to alleviate the crushing burden that prisoner litigation was imposing on the nation's courts. The statute furthers that goal by exploiting the ability of existing prison grievance procedures to provide relief that may satisfy an inmate without litigation, to filter out frivolous claims, and to develop a record that may help to define the contours of any litigation. Again, only administrative grievances that are considered on the merits provide those benefits. *See supra* at 8.

Thus, to conclude that the PLRA's exhaustion requirement has no procedural default component, one must believe that Congress did not aim to strongly encourage inmates to file timely prison grievances, but rather was content to pin the effectiveness of the exhaustion requirement on hopes that prison officials would seize any "opportunity"

to consider grievances on the merits, no matter how and when those grievance were presented. Not only is that view at odds with Congress's clear intent to "invigorate[] the exhaustion prescription" for inmate suits, *Porter*, 534 U.S. at 524, but it "improperly shifts the burden [of the exhaustion requirement] from inmates to prison officials." *Thomas*, 337 F.3d at 742 (Rosen, J., dissenting in part).

Indeed, the Ninth Circuit's rule presents prison officials with the dilemma of either enforcing their administrative time limits or routinely ignoring such limits in order to allow for untimely grievance filings to yield the benefits of meaningful exhaustion. Choosing the latter course would essentially erase the grievance system's deadlines and sacrifice the integrity of the grievance procedures so that federal caseloads can be reduced.

Administrative time limits are critical to the effectiveness of grievance processes as a tool for prison management. No dispute resolution procedure can operate without such deadlines, and strong imperatives of prison management require that the time limits for prison grievance filings and appeals (as well as those for officials' decisions on such filings) be rather short. For example, such deadlines allow the administrative process to capture "the inherent benefit of prompt investigation, while memories are still fresh and all involved inmates and prison employees remain at the facility." *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part). Facilitating effective investigation is essential given the huge volume of grievances that prison officials must process and the quotidian nature of many inmate grievances. *See, e.g.*, N.Y. Dep't of Corr. Servs., Inmate Grievance Program Annual Report 2-3 (2004) (showing that inmates in the New York State correctional system filed 44,587

grievances in 2004); *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973) (noting that "most potential litigation involving state prisoners arises on a day-to-day basis").

The administrative deadlines of grievance systems also reflect "the desire to bring the entire matter, including all available internal appeals, to a conclusion within a reasonable time period," *Thomas*, 337 F.3d at 753 (Rosen, J., dissenting in part) — a goal that assumes added importance when an inmate's lawsuit must await the conclusion of the administrative process. *See McCarthy*, 503 U.S. at 147 (recognizing the "prejudice" that "may result . . . from an unreasonable or indefinite timeframe for administrative action" where exhaustion is required). Further, the time limits enable swift remedial action, which minimizes the adverse consequences of any earlier error and is more likely to satisfy the inmate than a delayed response. Finally, the deadlines ensure that correctional officials receive timely feedback about problems before inmate dissatisfaction with institutional policies or the conduct of prison employees festers and leads to unrest or disturbances among the prison population.[8]

It is illogical to suppose that Congress meant for the PLRA exhaustion requirement to interfere with prison officials' enforcement of administrative deadlines and to compromise the effectiveness of prison grievance systems

8. Indeed, New York's prison grievance procedures were developed in 1975 in direct response to the Attica uprising of September 1971. *See Matter of Patterson v. Smith*, 53 N.Y.2d 98, 101 (1981) ("The McKay Commission, appointed to look into the causes of that uprising and make recommendations for change, concluded that a major cause of inmate tension was the lack of a nonviolent means of resolving grievances.").

— particularly when federal legislators emphasized their desire to the contrary. *See*, *e.g.*, 141 Cong. Rec. S14413, S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch) ("[I]t is time to . . . return [control of our prisons] to competent administrators"). Yet that assumption is exactly what the Ninth Circuit's holding requires, and accordingly this Court should grant certiorari to reverse it.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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